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SUPREME COURT, U.S.

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Supreme Court of the United States

October Term, 1952

No. 488

THE CALLANAN ROAD IMPROVEMENT COMPANY,
A Corporation, South Bethlehem, New York,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and CORNELL STEAMBOAT COMPANY.

REPLY BY CORNELL STEAMBOAT COMPANY, APPELLEE, TO PETITION OF THE CALLANAN ROAD IMPROVEMENT COMPANY FOR REHEARING

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This reply by Cornell Steamboat Company to appellant's petition for rehearing, dated May 19, 1953, opposes the granting of such petition on the ground that it is inequitable and utterly without merit.

History of the proceeding shows appellant's contentions to be without merit. This Court (73 S. Ct. 803, 804) correctly shows that the "grandfather" application of Joseph R. Hutton, appellant's predecessor, was granted by order dated July 17, 1942, incorporating by reference the findings in the accompanying report that Hutton "owns and manages 1 steam power boat of about 240 horsepower, and 4 barges, all of which are operated as a unit. The power boat is used to tow the barges but also carries about 150

gross tons of freight. On occasion other barges are rented or chartered for operation in applicant's fleet". The authority granted was to operate "as a common carrier in interstate or foreign commerce, of commodities generally" on the waters specified. The indisputable conclusion by the Court is (p. 805):

> "Thus it will be seen that the Commission found the operations of Hutton to be those of a common carrier by water of commodities generally in self-propelled vessels which he owned and which he also used to tow barges he owned, rented, or chartered. *There is no finding that his operations included the towing of barges which he did not own, rent, or charter.*" (Emphasis supplied.)

The Court correctly points out that "The certificate was accepted by Hutton, and, as far as appears on this record, he operated under it until March 7, 1944 in the same manner as he had before".

The Court then points out that the Commission on March 7, 1944, amended the 1942 certificate, specifying the type of vessels to be used in the exercise of its authority theretofore granted. The Court said "This amended certificate, which limited Hutton to the identical operations he had long carried on and upon which his section 309 rights were authorized, was accepted by him without question, and he continued to operate under it until his death several months later".

By order, dated August 18, 1947, as the Court points out, transfer of the 1944 amended certificate to appellant was authorized by the Commission, and on February 5, 1948, an amended certificate was issued to appellant. The Court said "Thus, the appellant sought and received a transfer of the amended certificate of March 7, 1944, limited by consent as to waters to be operated upon".

The Court significantly states (p. 806) that Hutton had "accepted the modified certificate [of 1944] and operated under it, just as he had always operated", that "His operation was not cut down by the limitations placed upon the certificate", and that "The appellant, as transferee of that modified certificate, stands in no better position than Hutton stood". The Court further pointed out that in the transfer proceeding "the appellant objected that the protestant there could not raise the question of the Commission's power to modify the certificate, as this would be a collateral attack on the Commission's order". The Commission's report in the *Transfer case*, authorizing transfer of the 1944 Hutton certificate to appellant refers to appellant's contention (R. 20):

> "that the certificate may not be attacked collaterally in this proceeding, and * * * that when a certificate is finally granted, and the time for rehearing has expired, the certificate is not subject to revocation in whole or in part, citing *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424".

The Court states that in the present proceeding appellant seeks to do what it said could not be done, namely attack collaterally the 1944 order. The Court continued "It cannot in this collateral proceeding attack the validity of the Commission's order of March 7, 1944. * * * The appellant must take the certificate as it stood at the time it sought and received the Commission's approval for its transfer". The Court points out (p. 806):

> "The appellant cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval. If the appellant then had taken the position it seeks now, the Commission might conceivably have refused its approval of the transfer. The appellant accepted the transfer with the limitations contained in the

certificate. The appellant now will not be heard to say it is entitled to receive more than its transferor had or the certificate transferred gave".

The Court thus pierces the fallacies of appellant's contentions and bluntly exposes the inequitable and unsound character thereof.

Appellant's claim of lack of admission of freightage authority only. Appellant in its petition states "That decision [by the Court] is based on the erroneous statement by the Court that appellant has 'admitted for the purposes of this case that the limitations placed by the order of March 7, 1944, upon the original certificate issued to Hutton in 1942, had the effect of restricting his operations to freightage and deny him the right to engage in towage'" and that "Appellant at no stage of the proceeding made any such admission * * *".

As pointed out above by the Court, the original 1942 certificate, with the accompanying report of the Commission incorporated by reference, contained "no finding that his [Hutton's] operations included the towing of barges which he did not own, rent, or charter", and that "The certificate was accepted by Hutton". The 1944 certificate specified the type of vessels in the exercise of the authority granted, the authority being to operate "by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vesssls * * * in the transportation of commodities generally" on the waters specified. This, as the Court pointed out, "limited Hutton to the identical operations he had long carried on" and "was accepted by him without question". This was the certificate that was transferred to appellant in the *Transfer case* in 1947 and which appellant insisted could not be collaterally attacked.

Neither Hutton nor appellant made any contention in the 1942, 1944, or 1947 proceedings that the carrier was

entitled to towage rights. It was recognized by numerous decisions of the Commission that the 1944 certificate included authority to perform freightage and not towage. (See this appellee's brief of March 31, 1953 pp. 25-33.)

That appellant knew that it had no towage rights under the 1944 certificate transferred to it and the 1948 certificate effectuating such transfer is shown by the later admission by appellant's counsel in the interpretation proceeding which led to the present court proceeding. At the hearing on February 23, 1951, counsel for appellant, who was counsel in the *Transfer case*, made the following admission (see appellee's brief of March 31, 1953, p. 23, and stipulation that the testimony before the Commission may be used):

> "Mr. Curry [counsel for Cornell]: It is my understanding that it is admitted by the petitioner [appellant] that the amended certificate which it has received under this transfer authority does not include the right to perform towage.
>
> Mr. Wilson [counsel for Callanan]: That is true, Mr. Curry. It includes the right to operate as a common carrier in the transportation of general commodities, with the use of non-self-propelled vessels and separate towing vessels.
>
> Mr. Curry: That is my understanding. Thank you.
>
> Exam. Konigsberg: And it is your position that that type of service performed is not towage but freightage?
>
> Mr. Wilson: That is right, and that the allowances published in the tariff are fully authorized and just and reasonable under Section 314, and so forth".

Moreover, as pointed out in appellee's brief the roundabout scheme resorted to by appellant of allowances to shippers furnishing their barges, instead of publishing a simple towage tariff, showed that appellant knew that it was restricted to freightage rights. Its filing of an application

for temporary authority to perform towage, an application to obtain a certificate of convenience and necessity to perform towage, and its application to acquire towage rights from another carrier all further indicate that it knew that its certificate is limited to freighting (brief, pp. 23-25).

Furthermore, the strenuous efforts made by appellant in the present proceeding to have the 1944 certificate set aside as an unauthorized amendment of the 1942 certificate is based on the assumption, and is an admission, that the 1944 certificate does not authorize towage. Appellant's whole argument as to claimed revocation is based on the allegation that the 1944 certificate curtailed the asserted broader scope of the 1942 certificate so as to limit the operation to freightage. The fact is, as recognized by the Court, that the 1944 certificate did not cut down Hutton's operation by the limitation in the certificate (p. 806), the operation being merely freightage and not towage.

Appellant's dissatisfaction with the Court's decision appears to be a continuation of its view that every one is out of step except appellant. The hearing examiner, Division 4 of the Commission, the entire Commission, the lower Court and this Court have held against appellant, after full and fair opportunity for it to present its contentions.

Appellant's contentions are not only inequitable and unsound but run counter to the long continued practice by the Commission under the certificate provisions of the Interstate Commerce Act and are against the best interests of the water carrier industry and the public served by it.

This appellee is limited in its certificate to towage. It is severely unjust that appellant should be permitted to cut across the authority of its certificate to perform towage

when such authority does not exist. The Court's decision that this cannot be done should not be disturbed.

Appellant's petition for rehearing should be denied.

Respectfully submitted,

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